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ABSTRACT

For many years, discrepancies in salary and advancements for men and women working in higher education went unchallenged, due primarily to the fact that no legal vehicle existed on which a suit could be brought other than the Fourteenth Amendment, which could apply only to state institutions or those which could be said to be substantially state related. This paper reviews the legal steps which have helped women battle sex discrimination in universities and colleges. It also describes in detail the first court case to make use of new anti-sexism legislation (Title VII of the Civil Rights Act of 1964) in 1973, quoting extensively from the fact findings made by the federal judge in the case. The speech also briefly describes actions pending. (Author/HMV)

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SEX DISCRIMINATION IN ACADEMIA--
CAN THE COURTS PROVIDE AN ANSWER?

In this year of 1974, the existence of sex discrimination in universities and colleges on a wholesale basis is no longer open to question. Persons who deny it simply reveal their ignorance of the well documented studies, or their allegiance to a system in which only white males are regarded as fit for advancement in academic employment.

The basic and fundamental fact is that women have been treated differently, that is to say less well, than men. Women are not hired and promoted at the same rate, nor have they been paid as well as their male counterparts. A comparison of the numbers of faculty women employed in 1959-60 with those employed in 1971-72 discloses that, while the percentage of women in all ranks has remained stable, the percentage in the ranks of professor, associate professor and even assistant professor has decreased but the percentage of women instructors and lecturers has risen sharply. Such under-representation of women cannot be attributed to the lack of women holding doctorates, or to any policy of universities to hire women with lesser qualifications than men.

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For many years, discrepancies in salary and advancement went unchallenged, due primarily to the fact that no legal vehicle existed on which a suit could be brought other than the Fourteenth Amendment to the United States Constitution, which would apply only to state institutions, or those which could be said to be state related in a substantial manner. In addition, the Supreme Court of the United States had not interpreted the Fourteenth Amendment to require equal treatment for women in a variety of employment situations.

In 1970, through the ingenuity and resourcefulness of Dr. Bernice Sandler, a way for women to confront universities appeared in the form of filing complaints against universities receiving federal contract funds under Executive Order 11246. Although some 350 universities were charged with having discriminated against women in the ensuing years of 1970 to 1973, and a number of investigations bore out these complaints on several campuses, not one university was ever denied federal funds beyond a temporary period, nor was any federal contract cancelled in accordance with remedies provided under the Executive Order.

It was not until March of 1972 that Title VII of the Civil Rights Act of 1964, which prohibits discrimination

in employment on the basis of race, national origin, religion and sex, was amended to cover educational institutions. In extending the right to sue educational institutions to victims of employment discrimination, Congress cited as a reason:

> "Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. In the field of higher education, the fact that black scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge. Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars.
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> When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. In a study conducted by Theodore Kaplow and Reece J. McGee, it was found that the primary factors determining the hiring of male faculty members were prestige and compatability, but that women were generally considered to be outside of the prestige system altogether.
>
> The Committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational

> institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the provisions of the Act."

In that same year, the Equal Pay Act was amended to cover for the first time professional, administrative and executive employees. It is my understanding that several universities are presently being investigated by the Department of Labor.

The first case to make use of Title VII was brought by Dr. Sharon Johnson against the University of Pittsburgh, specifically, the Medical School of that institution. In that action, we were attempting to prevent the University from terminating Dr. Johnson's employment as an Assistant Professor in the Department of Biochemistry, as of June 30, 1973. Our plea for an injunction had as an important component the fact that, if she were terminated, she would not be able to pursue her research in a laboratory she had constructed over a five-year period, with approximately one-third of a million dollars in federal funds, which she had been awarded as principal investigator. The University had already notified

the National Institutes of Health that it did not want to continue the grant, and all of Dr. Johnson's efforts to find employment and "move her grant" elsewhere had failed. Dismantling of her laboratory and consequent loss, not only to herself, but to the granting agency and ultimately to all of us as taxpayers, was imminent.

At the University of Pittsburgh, there is the familiar up or out policy, which requires the granting of tenure by the end of the sixth year, or termination. The University claimed that it did not wish to grant her tenure and promotion to Associate Professor, because her research was not relevant to the mission of the department, and she was allegedly deficient in her teaching of medical students. After a hearing which consumed five days, the federal district court entered an order requiring the university to retain Dr. Johnson in its employment until a decision was reached after a full trial of the case. I should like to quote for you some of the findings of fact made by the federal judge in this case, which will indicate the basis for the court's holding:

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FINDINGS OF FACT

(1) Plaintiff was employed in 1967 for three years as Assistant Professor without tenure in the Department of Biochemistry of the School of Medicine at the University of Pittsburgh at a salary of $13,000 per year.

(2) At the time of her employment, plaintiff was advised by the Chairman of the Biochemistry Department that the requirements for securing tenure within 6 years were research and membership in the American Society of Biological Chemists. (Exhibit B, Complaint).

(3) Plaintiff's employment as Assistant Professor without tenure was renewed in 1970 by the University of Pittsburgh for an additional term of three years until June 30, 1973. Her present salary after certain raises and a cost of living increase is $18,000 per year.

(5) During her employment at the University of Pittsburgh, plaintiff did attain membership in the American Society of Biological Chemists; attained professional stature; did publish independent research of high quality; was active in other contributions; and, fulfilled her teaching requirements in a fashion that was not criticized prior to 1971.

(6) At no time was plaintiff advised that the criteria for promotion in her department had changed or that the criteria in the Faculty Handbook of the University of Pittsburgh had changed.

(7) The criteria for appointment and promotion of tenured employees is set forth in the Faculty Handbook of the University of Pittsburgh as follows: effectiveness as a teacher; research and scholarship; professional stature; and, other contributions.

(8) At no time during the years 1967, 1968, 1969, 1970 and 1971 was plaintiff

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advised that her teaching was inadequate or that her research was not in an area relevant to the Department of Biochemistry or the School of Medicine except that the head of the Department in September 1971 suggested that she should have her equations ready on the blackboards in lecture.

(11) The October, 1971, meeting was held without notice to plaintiff; without any request of plaintiff to supply references from whom the committee could obtain an assessment of her work; and, without affording plaintiff the opportunity to supply information on current research, or matters submitted to publications but not yet printed.

(12) There is no evidence that the procedure used in October 1971 was ever before used to terminate the employment of a professional employee in the tenure stream at the University of Pittsburgh.

(13) On October 27, 1971, it was decided not to grant plaintiff tenure and this was based primarily on the committee's finding that plaintiff's teaching was inadequate. This conclusion of plaintiff's teaching was purportedly based on an assessment of four lectures by plaintiff in September 1971.

(14) The first lecture given by plaintiff in September, 1971, was regarded by the Chairman as being good in its approach and content but was criticised as to placing of equations on blackboards.

(15) The 1971 assessment of plaintiff's teaching failed to consider her teaching of 4 years; did not consider either plaintiff's teaching of graduate students in the Biochemistry Department, or plaintiff's other teaching functions in advising students and in laboratory instruction, nor was consideration given to the other criteria set forth in Finding No. 7.

(22) Plaintiff will suffer irreparable harm if her employment is not continued at the University of Pittsburgh through loss of salary, loss of the grant for re-

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search and damage to her professional standing.

(23) The evidence indicates that sex discrimination was operating at the University of Pittsburgh throughout the time of plaintiff's employment and the University has in effect an affirmative action plan which is purported to reduce such discrimination.

(24) In the decision of October 27, 1971, defendants presented no evidence that the criteria for promotion pertaining to plaintiff's research and scholarship, professional stature, and other contributions were properly considered.

(25) After October 27, 1971, the Chairman of the Biochemistry Department of the School of Medicine, Edward C. Heath, and the tenured faculty then solicited outside documentation to discredit plaintiff in an effort to substantiate their decision.

(26) In the granting of tenure after seven years to a male professor, Warren Divan, the School of Medicine through Dean N. Medearis applied different standards than those which were applied to plaintiff although Professor Divan taught some of the same courses as plaintiff and had substantially the same evaluation as a lecturer.

(27) The School of Medicine consistently paid less compensation and awarded smaller raises to plaintiff than were awarded to male members of the faculty.

(28) The School of Medicine has consistently granted tenure to men employees and not granted tenure to women employees.

It should be emphasized that the Court made the finding of discrimination on the basis of sex grounded on statistical evidence, and different treatment of a comparable male, who was granted tenure and was even allowed to stay on an extra year beyond the usual limit of time within which a faculty member was to go up or out.

Dr. Johnson's case points up a vital issue in almost every academic discrimination case: the arbitrary nature of the decisions in which standards which have been applied to males are not applied to females to grant the females the same advancement and benefits. It would appear that objective measurement of whatever these criteria may be is an absolute necessity to fair and equal treatment, which incidentally, would enure to the benefit of all faculty members. Nevertheless, university administrators defend the lack of objective measurement of criteria on the ground that subjective decisions are at the heart of the academic process and that academic freedom will somehow be threatened by an examination of the process. What is actually meant is that no attention has ever been paid to a better system and that the freedom to discriminate against women and minorities would be endangered by change. It seems unfortunate that

the honorable term of academic freedom and the high principles it evokes would be used to cloak discrimination banned by law.

I shall not touch on the interesting question which may yet be raised in academic litigation: are the criteria used for hiring and promotion actually valid insofar as they select out the person who is in fact qualified to perform the duties of the job? This is of special concern to psychologists, who no doubt will be called upon to give testimony on such points in the future. This will have greater impact in the sphere of non-faculty employment, where staff personnel who are women are placed primarily in secretarial or clerical jobs, regardless of training and education, and men are classified as "administrative assistants."

Although Dr. Johnson's case was the first in which an injunction was granted and the power of Title VII was felt by a university, more and more actions are being filed by women throughout the country. One action filed recently is notable in that not only the University of Tennessee and its Board of Regents were sued, but in addition, two officials of the United States Department of Health, Education and Welfare were named as defendants, and alleged to have failed to carry

out their duties in enforcing Executive Order 11246, once findings had been made by the agency in favor of the woman claiming sex discrimination. Class actions are presently pending against the University of California at Berkeley, the University of Mississippi and the University of Pittsburgh, to name a few of the institutions.

In times of growing austerity, it seems most unfortunate that time and money must be wasted in litigating basic rights for women in academic employment. With the long years spent by women thus far in pursuing remedies through dialogue, petitions, and all manner of communication with university administrators and legislators, there can be no doubt that steps short of the last resort to litigation have been exhausted.

At this moment it is clear that institutions still have the opportunity to make constructive changes without the trauma of legal action. It is my hope that the far reaching issues raised by women will be resolved at the conference table, but if they are not, they will surely be resolved in the courts.

Additional references on this and related subjects are available in my article entitled "Equality of Opportunity in Higher Education: Impact of Contract Compliance and the Equal Rights Amendment", Liberal Education, May 1973, pp. 202-216. See also my article "Employment Litigation: A Feminist Viewpoint", Trial, November/December 1973, pg. 13, et seq.